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No. 84-1819

In The

Supreme Court of the United States

October Term, 1984

AVONDALE SHIPYARDS, INC.,

Petitioner,

vs.

JOE ROSETTI,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

A. INTRODUCTION

In this negligence action brought under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 et seq. (hereinafter referred to as LHWCA

or the Act), the District Court for the Eastern District of Louisiana granted summary judgment in favor of Petitioner, Avondale Shipyards (hereinafter referred to as Avondale or Defendant), finding that Plaintiff did not state a cause of action under 33 U.S.C. § 905(b) because the vessel upon which he was working when injured was incomplete. (*See,* Petition for Writ of Certiorari at Appendix B.) The Fifth Circuit found that the District Court had erred in its grant of summary judgment by failing to follow binding Fifth Circuit precedent which holds that "incomplete ships upon which 33 U.S.C. § 902 (3) employees are working at a site [within] the coverage of the Act, 33 U.S.C. § 903(b), are vessels within the meaning of 33 U.S.C. § 902(21)." *Hall v. Hvide Hull No. 3*, 746 F.2d 294, 297 (5th Cir. 1984), *quoting Lundy v. Litton Systems, Inc.,* 624 F.2d 590, 592 (5th Cir. 1980). In its Petition for Certiorari before this Honorable Court, Avondale concedes that the ship upon which Plaintiff/Respondent, Joe Rosetti (hereinafter referred to as plaintiff or Rosetti), was injured was a vessel under the LHWCA. *See,* Petition for Writ of Certiorari at 5. Instead, Avondale raises an issue it first raised in its Petition for Rehearing before the Fifth Circuit, i.e., "whether the tort in [this case] bears a significant relationship to traditional maritime activity as required by *Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed. 2d 454 (1972); *Foremost Insurance Co. v. Richardson,* 457 U.S. 668, 102 S.Ct. 2654, 73 L.Ed. 2d 306 (1982)." Petition for Writ of Certiorari at 4.

Avondale misleads this Honorable Court by failing to point out that this jurisdictional issue was not involved in the case sub judice inasmuch as all parties agreed that

there was diversity jurisdiction in the *Rosetti* case. Indeed, the issue of admiralty jurisdiction was present only in the two cases consolidated with this case before the Fifth Circuit Court of Appeals. This point was mentioned in at least three places in the Fifth Circuit's Opinion. *See, Hall, supra,* 746 F.2d at 296 n.2, 300 n.12, & 305. Accordingly, Avondale is arguing an issue that is simply not presented by the facts of this case.

Moreover, Avondale's broad assertions that the Fifth Circuit's ruling concerning the jurisdictional issue presented by the two cases consolidated with the *Rosetti* case is a dramatic divergence from established precedent and has far-reaching implications are absolutely untrue.

Rather, as a cursory review of the Court of Appeals' opinion reveals, its holding that admiralty jurisdiction extended to injuries on incomplete vessels was based on this Court's holdings in *Director, Office of Workers' Compensation Programs v. Perini North River Associates,* 459 U.S. 297, 320 n.29, 103 S.Ct. 634, 649 n.29 (1984), and *Scindia Steam & Navigation Co., Ltd., v. De Los Santos,* 451 U.S. 156, 165 n.13, 101 S.Ct. 1614, 1621 n.13, 68 L.Ed.2d 1 (1981).

B. STATEMENT OF THE CASE

Plaintiff Rosetti was injured on March 2, 1981, at Avondale Shipyards. At the time of his injury, Plaintiff was employed by Universal Systems, Inc., as a pipefitter aboard the OGDEN I at the Avondale Shipyard. Since the time of his injury, Rosetti has received compensation

benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901, et seq. Rosetti, a Mississippi resident, filed his Complaint on March 1, 1982, in the Eastern District of Louisiana against Avondale, a Louisiana corporation, for causes of action arising under 33 U.S.C. § 905(b), which provides:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title . . .

Avondale filed its answer some four months later, and discovery in the case then began.

On August 1, 1983, the lower court held a conference with all counsel during which the trial judge instructed Avondale's counsel to file a motion for summary judgment immediately on the grounds that the vessel upon which the Plaintiff was injured was incomplete. The motion was promptly filed as instructed on August 3, 1983.

Avondale's memorandum in support of the motion for summary judgment set forth several bases for judgment in its favor, including the contention that Plaintiff had no cause of action under § 905(b) because the vessel upon which he was working when injured was under construction and incomplete. Significantly, Avondale did not contend that the court lacked jurisdiction of the claim or that *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972), had any application to this case.

On August 19, 1983, the lower court sustained Avondale's motion for summary judgment on the grounds that

the OGDEN I was not a "vessel" inasmuch as it was incomplete.

After denial of a motion for reconsideration, Plaintiff timely filed his notice of appeal to the United States Circuit Court of Appeals for the Fifth Circuit. On appeal, Plaintiff contended that the lower court erred in failing to follow binding Fifth Circuit precedent which holds that "incomplete ships upon which 33 U.S.C. § 902 (3) employees are working at a site [within] the coverage of the Act, 33 U.S.C. § 903(b), are vessels within the meaning of 33 U.S.C. § 902(21)." *Lundy v. Litton Systems, Inc.*, 624 F.2d 590 (5th Cir. 1980). Avondale contended that since the OGDEN I was incomplete, there was no maritime cause of action under § 905(b). It is significant that Avondale did not argue that this Court's holding in *Executive Jet, supra,* barred the action. In fact, Avondale has never disputed the diversity of citizenship between the parties.

On appeal to the Fifth Circuit, the case sub judice was consolidated with *Hall v. Hvide Hull No. 3,* No. 83-3471, and *Dang v. Avondale, et al,* No. 83-3580, both of which were decided by the same district court judge that dismissed this action on the same grounds, i.e., that the vessels upon which the plaintiffs were working were incomplete. Because there was not diversity jurisdiction in the other two cases and the only basis for jurisdiction asserted was under admiralty, the defendants in the two related actions also argued that no jurisdiction existed under the rationale of *Executive Jet.*

On November 15, 1984, the Fifth Circuit Court of Appeals issued its consolidated ruling vacating and re-

manding the three consolidated cases for trials on the merits. Although the consolidated opinion addresses two issues, i.e., whether the hulls, floating on navigable waters, were vessels under 33 U.S.C. § 905(b), and whether maritime jurisdiction existed, the Fifth Circuit opinion pointed out in three separate places that the jurisdictional issue did not apply to the case sub judice since diversity jurisdiction existed. *See, Hall, supra,* 746 F.2d at 296 n.2, 300 n.12, and 305. As to the two cases in which the jurisdictional issue was presented, the Fifth Circuit cogently reasoned that maritime jurisdiction did exist, stating as follows:

> Under the Supreme Court's decisions in [*Director, Office of Workers' Compensation Programs v. Perini North River Associates,* 459 U.S. 297, 103 S.Ct. 634 (1984), and *Scindia Steam & Navigation Co., Ltd. v. De Los Santos,* 451 U.S. 156, 101 S.Ct. 1615, 16 L.Ed.2d 1 (1981)], . . . the Congressional intent of the 1972 amendments to the Longshoremen's Act, including that provided by § 905(b), was to preserve within the federal admiralty jurisdiction the traditional maritime tort remedy of an Act-covered employee for injuries caused by the negligence of a vessel, broadly defined, while on the navigable waters. For purposes of federal admiralty jurisdiction, maritime connexity (*Executive Jet*'s requirement that the injury be in a 'traditional maritime activity') was, in effect, Congressionally so determined through Congressional acceptance, in the 1972 revision of the Longshoremen's Act, of pre-1972 traditional judicial determinations of the maritime character of the activity involved in injuries to these amphibious workers. Thus, shipbuilding employees injured in constructing a vessel on navigable waters are regarded by § 905(b) as no less injured in a maritime employment than they were, before the enactment of § 905(b) in 1972, by the pre-1972 jurisprudence.

746 F.2d at 303 (footnote omitted).

Avondale's petition for rehearing en banc was denied, as was its motion for stay of mandate pending the filing of a petition for certiorari before this Honorable Court. The case is now set for trial before the United States District Court for the Eastern District of Louisiana on November 4, 1985.

C. DISCUSSION OF AUTHORITIES

Despite Avondale's efforts to create the impression that this case involves a unique legal theory or a substantial departure from prior law, this case truly is a quite simple tort action based upon established law and present in federal court by virtue of the diverse citizenship of the parties. There is and can be no jurisdictional issue present in this case since all parties do agree that there is diversity jurisdiction. Indeed, the only issue presented in this case before the Fifth Circuit, i.e., whether the ship upon which Plaintiff was injured was a "vessel" within the meaning of the LHWCA, has been conceded before this Honorable Court. Accordingly, there are simply no issues left for determination.

Avondale's only quarrel with the appellate court's ruling is on an issue that was not present in this case but was only raised in the two cases consolidated with Rosetti's. Since a jurisdictional question is not properly presented in this case, it is clear that Avondale has simply chosen the wrong case to bring to this Court's attention via its Petition for Certiorari. Accordingly, since the only issue decided by the Fifth Circuit in Rosetti's case is not presently questioned by Avondale, it is clear beyond peradventure that certiorari should not be granted.

Moreover, even as to the federal maritime jurisdictional issue decided in the two cases consolidated with the case at bar, Avondale has failed to establish that certiorari should be granted.

In deciding whether this case should be reviewed on certiorari, Rule 17 of the Rules of the Supreme Court of the United States provides guidelines as to what type of case is appropriate for review. It is significant, if not dispositive, that the Fifth Circuit's ruling in this case is *not* in conflict with the decision of any other federal court of appeals on the same matter, nor does it conflict with any state court ruling of last resort. Moreover, this case does *not* involve an important question of federal law which has not been but should be settled by this Court, nor did the Fifth Circuit decide a federal question in a way in conflict with the applicable decisions of this Court.

Avondale attempts to bring this case within the purview of Rule 17 by arguing that the appellate court's opinion is in conflict with the cases of other circuits. Nothing could be farther from the truth.

Avondale cites only one decision outside the Fifth Circuit as being contrary to the lower court's ruling on the maritime jurisdictional issue which, as shown above, is not raised by this appeal. That decision, *Frankel v. Bethlehem-Fairfield Shipyards, Inc.*, 132 F.2d 634 (4th Cir. 1942), *cert. denied* 319 U.S. 746, 63 S.Ct. 1030 (1943), however, was decided well prior to the 1972 Amendments to the LHWCA that created § 905(b) upon which Plaintiff in the case sub judice bases his claim, and instead involved only Jones Act claims. For these reasons, *Frankel* is simply not instructive in this case.

Moreover, and even though this Honorable Court does not sit to resolve conflicts within a circuit, Plaintiff would also show that Avondale's assertions that the lower court's opinion conflicts with other Fifth Circuit decisions is without merit. *Hollister v. Luke Construction Co.*, 517 F.2d 920 (5th Cir. 1975), involved a suit brought under the Jones Act, the doctrine of unseaworthiness, and the general maritime law for injuries on an incompleted barge. The Jones Act claim was dismissed pursuant to binding precedent that holds that an incomplete ship is not a vessel for purposes of the Jones Act. The unseaworthiness claim was likewise dismissed because of the established principle that an incomplete vessel carries no warranty of seaworthiness. The general maritime negligence claim was dismissed because of lack of maritime flavor. Significantly, the plaintiff in *Hollister* did not seek to bring an action under § 905(b) of the LHWCA. In fact, the Fifth Circuit court expressly recognized that the plaintiff in *Hollister* may have had a viable cause of action under § 905(b) when it stated that "his remedies, if any, are under either the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905, or state compensation laws." *Hollister*, 517 F.2d at 921.

Garcia v. American Marine Corp., 432 F.2d 6 (5th Cir. 1970), and *Alfred v. M/V MARGARET LYKES*, 398 F.2d 684 (5th Cir. 1968), were both decided prior to the 1972 Amendments to the LHWCA that created § 905(b) and both involved unseaworthiness claims and not claims brought under the statute which allows the cause of action here sued upon.

Lowe v. Ingalls Shipbuilding, 723 F.2d 1173 (5th Cir. 1984), held only that federal admiralty jurisdiction was

not presented by a suit to determine a shipbuilding employer's claim of tort liability of an asbestos manufacturer. Like the other cases cited by Avondale, *Lowe* does not involve a vessel or a § 905(b) claim against a vessel or its owner, or a question of the scope of federal court admiralty jurisdiction under the LHWCA.

Moreover, the Fifth Circuit's opinion regarding the jurisdictional issue which is not present in this case was based expressly on this Honorable Court's opinion in *Director, Office of Workers' Compensation Programs v. Perini North River Associates,* 459 U.S. 297, 103 S.Ct. 634 (1983). In *Perini,* this Honorable Court was squarely faced with the question of whether claims arising under the LHWCA must meet the provisions of *Executive Jet, supra.* This Court's discussion in that regard was as follows:

> Perini cites our decision in *Executive Jet Aviation, Inc.* [*supra*], and argues that the LHWCA is premised upon admiralty jurisdiction, which requires a connection between an employee and traditional maritime activity. Perini's reliance on *Executive Jet* is misplaced. In that case, the only issue before the Court was whether federal admiralty jurisdiction extended to tort claims arising out of the crash of an airplane into navigable waters on a flight "within the continental United States, which [is] principally over land." *Id.,* at 266, 93 S.Ct., at 503. Jurisdiction in *Executive Jet* was predicated on 28 U.S.C. § 1333(1), which provides that the federal district courts have original and exclusive jurisdiction of "[a]ny civil case of admiralty or maritime jurisdiction."
>
> The explicit language of *Executive Jet* makes it clear that our discussion was occasioned by "the problems inherent in applying a locality-alone test of admiralty tort jurisdiction to crashes of aircraft" in a situation

> where "the fact that an aircraft happens to fall in navigable waters, rather than on land, is wholly fortuitous." *Id.*, at 265, 266, 93 S.Ct., at 503, 504. Although the term "maritime" occurs both in 28 U.S.C. § 1333(1) and in § 2(3) of the Act, these are two different statutes "each with different legislative histories and jurisprudential interpretations over the course of decades." *Boudreaux v. American Workover, Inc.*, 680 F.2d 1034, 1050 (CA 5 1982) (footnote omitted). In addition, Churchill, a marine construction worker, was by no means "fortuitously" on the water when he was injured.

Id., at 320 n.29, 103 S.Ct., at 649 n.29.

Avondale's attempts to distinguish *Perini* because it involved a question of jurisdiction for compensation and not jurisdiction for purposes of § 905(b) of the same Act is simply without merit. Obviously, if federal admiralty jurisdiction supports the LHWCA's compensation scheme, then it must also support § 905(b) of the same Act.

A holding that federal maritime jurisdiction exists for claims brought under § 905(b) is mandated in order to effectuate the congressional intent that federal law apply in such cases. Indeed, as the Senate Report states:

> [T]he Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending upon the law of the State in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions in the law shall be determined as a matter of Federal law. In that connection, the Committee intends that the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply in cases where the injured employee's own negligence may have contributed to causing

> the injury. Also, the Committee intends that the admiralty rule which precludes the defense of "assumption of risk" in an action by an injured employee shall also be applicable.

S. Rep. No. 92-1125, 92nd Cong. 2d Sess. at 102. *See also, Scindia Steam & Navigation Co. v. De Los Santos,* 451 U.S. 156, 165 n.13, 101 S.Ct. 1614, 1621 n.13, 68 L.Ed.2d 1 (1981). The congressional intent that a uniform body of federal law apply in these actions mandates a finding that maritime jurisdiction exists.

Accordingly, even though not presented in the case sub judice, the lower court's jurisdictional ruling is imminently correct.

CONCLUSION

The Fifth Circuit determined that the trial court erred in dismissing Plaintiff's case on the grounds that the ship upon which he was working was not a "vessel" within the meaning of the LHWCA. Avondale now concedes that this ruling was correct. Inasmuch as there is no jurisdictional issue present in this case because of the parties' diversity, this is simply not an appropriate case for the grant of certiorari under Rule 17 of the Supreme Court rules. In any event, this Court's holding in *Perini* forecloses any possible jurisdictional objection the Defendant may have.

Plaintiff has presented a straightforward case of negligence on the part of Avondale and has never been allowed to present that case to a jury. The Fifth Circuit

has ruled that Plaintiff is entitled to a trial on the merits and Avondale has cited no relevant authority indicating that the Fifth Circuit's decision was incorrectly decided. The ruling below has no far-reaching implications and is based upon long-settled principles of law. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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